Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1998

WORTH CAPITAL, INC.,
a Florida corporation,

Petitioner,

v

HERMAN MILLER, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, a party who agrees to arbitrate arbitrability and who actively participates in arbitration proceedings for some two years can seek an eleventh hour permanent judicial stay of arbitration.

RULE 29.6 STATEMENT

Petitioner states that it has no parent corporation or non-wholly owned subsidiaries.

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Petitioner, Worth Capital, Inc, ("Worth Capital"), respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *Herman Miller, Inc. v. Worth Capital,* No. 98-7732 (2d Cir. March 9, 1999) is not published, but can be found at 1999 U.S. App. Lexis 3837 (App. 1a). The opinion of the district court permanently staying arbitration in *Herman Miller, Inc. v. Worth Capital,* No. 97 Civ. 7878 (SAS) (S.D.N.Y. April 20, 1998) is not published but can be found at 1998 U.S. Dist. Lexis 5557 (App. 6a). The opinion of the district court denying Worth Capital's Motion for Rehearing in *Herman Miller, Inc. v. Worth Capital,* No.97 Civ. 7878 (SAS) (S.D.N.Y. May 4, 1998) is not published but can be found at 1998 U.S. Dist. Lexis 6275 (App. 16a).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari follows a judgment of the Second Circuit Court of Appeals affirming Respondent's, Herman Miller, Inc., ("HMI"), Motion for a Permanent Stay of Arbitration. The Second Circuit Court of Appeals' judgment was entered on March 10, 1999. This Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

1. 9 U.S.C. § 1 *et seq.* (Federal Arbitration Act).

STATEMENT OF THE CASE

A. *The Proceedings Below.*

Pursuant to a Demand For Arbitration dated May 4, 1995 and filed on May 5, 1995 with the American Arbitration Association (the "AAA"), Worth Capital, as assignee of J.J. Gangitano and R&G Affiliates, Inc., demanded arbitration against HMI to resolve its claim for damages arising out of and relating to a License Agreement dated October 1, 1988 between R&G Affiliates, Inc. and HMI (the "License Agreement").[1] The parties participated in the arbitration process for over two years. The matter was originally set to be arbitrated in New York on April 23-26, 1996, but was subsequently reset to be arbitrated in December of 1997, then reset to February of 1998. On September 23, 1997, HMI sought a permanent stay of the arbitration pursuant to § 7503(c) of the New York Civil Practice Law and Rules ("CPLR"), by filing its Verified Petition to Stay the Arbitration in the *Matter of Arbitration between Worth Capital, Inc., a Florida corporation, assignee of J.J.*

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1 Paragraph 11.1 of the License Agreement contains a broad based arbitration clause, providing that:

> [a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be resolved exclusively by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be conducted at a location selected by the arbitrator(s). The arbitration award shall be final and binding on the parties and enforceable in any court of competent jurisdiction.

(App. 7a)

Gangitano and R & G Affiliates, Inc., v. Herman Miller, Inc., a Michigan corporation, pending before the American Arbitration Association, New York Regional Office, Case Number: 13 M 133 00983 95 (AAA NYC), filed in the Supreme Court of the State of New York, in and for the County of New York, Index No. 604895/97.

On October 23, 1997, Worth Capital timely removed the action from the New York Supreme Court pursuant to 28 U.S.C. § 1441 (removal jurisdiction), 9 U.S.C. § 1 *et seq.* (the federal Arbitration Act) ("FAA"), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1332 (diversity jurisdiction).

Subsequent to the removal, HMI filed a motion for summary judgment seeking a permanent stay of arbitration based on the sole ground that a valid agreement to arbitrate was not made between the parties. Worth Capital filed an opposition memorandum and cross-motion for summary judgment to compel arbitration. In its motion, Worth Capital raised two points in support of arbitration: 1) that HMI waived its right to seek a judicial stay of arbitration by virtue of its extensive participation in the arbitration process and that its petition for stay was untimely, and 2) that the issue of whether Worth Capital has an arbitrable claim is for the arbitrator, not the court.

On April 20, 1998, the district court entered its order granting HMI's motion to permanently stay arbitration and denied Worth Capital's motion to compel arbitration. (App. 6a). In its ruling, the district court held that 1) HMI's petition to stay arbitration was timely, (App. 12a-13a), 2) that Worth Capital could not be considered an assignee of the Agreement and could not invoke its arbitration provision, (App. 13a-14a), 3) that the court, and not the arbitrator, should decide the

arbitrability in the instant case, *id.* and 4) that the doctrine of judicial estoppel did not apply to HMI. (App. 14a).

On. April 30, 1998, Worth Capital filed a motion for reconsideration arguing 1) that the district court failed to apply the substantive law of the State of New York with respect to the issue of HMI's waiver of its right to seek a stay of arbitration, and 2) that the district court erroneously overlooked Worth Capital's factual showing that the assignment of the License Agreement was not at issue when it held that there had not been a valid assignment of the License Agreement which would give Worth Capital standing to compel arbitration. On May 4, 1998, the Court denied Worth Capital's Motion for Reconsideration. (App. 16a).

On May 20, 1998, Worth Capital timely filed a Notice of Appeal of the district court's order to the United States Court of Appeals for the Second Circuit. On March 10, 1999, the United States Court of Appeals for the Second Circuit affirmed the district court's order permanently staying arbitration holding that notwithstanding the fact that Herman Miller filed its judicial petition for a stay of arbitration some two years after the arbitration had commenced, "little of a substantive nature occurred" during this two year period and that Herman Miller had "repeatedly reserved the right to contest the existence of an agreement to arbitrate. (App. 3a-4a).

The import of the Second Circuit's decision below is clear. In refusing to compel arbitration, the opinion below expressly holds that a party can agree to submit the issue of arbitrability to the arbitrator, can actively participate in an arbitration proceeding for some two years and still seek an eleventh hour permanent judicial stay of arbitration.

B. *Basis for Federal Jurisdiction in the Court of First Instance*

Jurisdiction in the United States District Court for the Southern District of New York was created pursuant to 28 U.S.C. § 1332 which states that district courts have original jurisdiction in civil actions where the matter in controversy exceeds the sum or value of $ 75,000 and is between citizens of different states. In the instant case, it is undisputed that the amount in controversy is more than $ 75,000. It is further undisputed that Worth Capital is a Florida corporation with its principal place of business in Pompano Beach, Florida. (App. 10a). HMI is a Michigan corporation with its principal place of business in Michigan. (App. 10a).

C. *Statement of the Relevant Facts*

The material facts are not in dispute. Pursuant to a Demand for Arbitration dated May 4, 1995 and filed on May 5, 1995 with the American Arbitration Association in Miami, Florida (the "AAA"), Worth Capital, as assignee of J.J. Gangitano and R&G Affiliates, Inc., demanded arbitration against HMI to resolve its claim for damages arising out of and relating to a License Agreement dated October 1, 1988 between R&G Affiliates, Inc. and HMI. (App. 7a-8a, 10a).

Worth Capital's right to compel HMI to submit to arbitration stems from an assignment by R&G Affiliates to Gangitano and from an assignment by Gangitano to Worth Capital but also from the undisputed fact that HMI is a signatory to the License Agreement. (App. 7a- 8a).

In 1989, Gangitano was the legal or equitable owner

of R&G. Contrary to HMI's claim that there was "no assignment of any kind" from R&G Affiliates to Gangitano, prior to January 3, 1990, Mr. Gangitano in fact orally transferred or assigned to himself R&G's claims against HMI. (App. 8a) *citing* (Gangitano Affidavit, sworn to December 15, 1997). Thereafter, by written Assignment dated January 3, 1990, Gangitano assigned to Worth Capital all right, title, interest and claim that he may personally have in or against Herman Miller, Inc. (App. 8a).

Paragraph 11.1 of the License Agreement contains a broad based arbitration clause, providing that:

> [a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be resolved exclusively by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be conducted at a location selected by the arbitrator(s). The arbitration award shall be final and binding on the parties and enforceable in any court of competent jurisdiction.

(App. 7a) *quoting* (License Agreement dated October 1, 1988). In addition, the agreement also stated the following:

> [HMI] has entered into this Agreement based upon its evaluation of Licensee's [R&G's] form and method of conducting business and the business acumen, financial capacity, and reputation of Licensee and its principals. This agreement is personal to Licensee and may not be transferred, in whole or in part, voluntarily,

> involuntarily, or by operation of law, including by any merger or consolidation, substantial change in the ownership or control of Licensee's business, or by any other means, except in accordance with this Article VII.

(App. 8a).

In its Demand For Arbitration, Worth Capital requested that venue of the arbitration be at the AAA's offices in Miami, Florida. (App. 10a). By letter dated May 10, 1995, the AAA acknowledged receipt of Worth's Demand For Arbitration, and enclosed a list of ten proposed arbitrators, a witness list and otherwise set out to administer the arbitration in accordance with its applicable rules. (App. 10a).

By letter dated May 30, 1995, HMI's counsel submitted to the AAA a memorandum of fact and law in support of its application to change venue of the arbitration hearings to New York City, rather than Miami, since R&G was located in New York City, the geographical area under the License Agreement encompassed Manhattan and the Bronx, and witnesses were located in New York. (App. 10a).

In addition, on page 2 of that May 30, 1995 letter memorandum, HMI's counsel specifically argued to the AAA the issues of arbitrability and timeliness. HMI argued that Worth Capital was not a permitted assignee of the License Agreement and therefore can neither claim under the Agreement nor invoke its arbitration provisions; that the claim is barred by the applicable statute of limitations; and that "these matters should be submitted to the appropriate persons in the locale that the AAA determines should hear the arbitration." *Id.*

By letter dated August 21, 1995, the AAA requested that Worth Capital file written comments to HMI's legal position as set forth in the aforesaid letter memorandum dated May 30, 1995 of its counsel.

By letter dated October 20, 1995, Worth Capital's attorneys argued that it was not the October 1, 1988 License Agreement that was assigned to Worth Capital, but rather its "claim fordamages against Herman Miller, Inc. for its wrongful actions." Worth Capital further argued that when Miller breached the Agreement, "any and all rights, title, interests and/or claim(s) against Herman Miller were assignable as a matter of law." Worth Capital further requested that the locale of the arbitration hearing be held in Miami, Florida.

By letter dated December 19, 1995, the AAA granted Miller's request to change venue to New York. (App. l0a). Thereafter, the parties engaged in the process of selecting an arbitrator. By letter dated Fcbruary 21, 1996, the AAA stated that from the lists executed and returned by the parties, it had appointed Ruth Kurtz, Esq. as the arbitrator, and hearings were set for April 23-26, 1996. (App. l0a). At the request of Worth's attorney, the hearing scheduled to begin on April 23, 1996 was postponed. (App. l0a).

HMI continued its unconditional participation in the arbitration proceedings. For example, by letter dated May 7, 1996, HMI's counsel stated that HMI has no objections to "limited discovery as the arbitrator may consider appropriate.

HMI further requested a preliminary conference before the arbitrator in order to outline the nature of Worth Capital's claim and in order to decide what discovery was appropriate.

HMI. also stated in its May 7, 1996 letter that at the preliminary conference, it intended to submit *to the arbitrator* the threshold issue of whether or not Worth Capital has an arbitrable claim against HMI.

In response, by letter dated May 8, 1996, the AAA requested that the parties advise of the dates when they would be available for a "Preliminary Hearing." HMI replied that it was available at any time (other than two dates in June of 1996).

By letter dated September 3, 1996, the AAA suggested the parties attempt mediation which Worth Capital had requested. However, as set forth in its prior letters dated January 22 and 24, 1996, HMI vigorously objected to mediation and unequivocally and unconditionally stated that it wished to "proceed with Arbitration."

By letter memorandum dated May 5, 1997, HMI's counsel made an extensive legal submission and again requested that the arbitrator schedule a preliminary hearing to decide the threshold issues of arbitrability and timeliness.

On August 12, 1997, the Arbitrator held a preliminary hearing, by telephone, which was participated in by Worth Capital's attorneys and by HMI's attorney, Philip M. Chiappone, Esq. (App. 10a). As set forth in the AAA's confirming letter dated August 14, 1997, the arbitrator directed, with the agreement of the parties, that Worth Capital file an expanded statement of claim by September 3, 1997; that Worth Capital had estimated that the amount of the damages ranges from one million to eight million dollars; that HMI would file a response to the expanded statement of claim by September 17, 1997; that the parties exchange document

requests by October 6, 1997; and that hearings be scheduled for December 15-19, 1997.

Pursuant to the Arbitrator's order, Worth Capital expanded its claim pursuant to its Amended Statement of Claim dated September 3, 1997.

Shortly after the August 12, 1997 preliminary hearing and service of Worth Capital's Amended Statement of Claim on September 3, 1997, HMI adopted a new legal strategy which was completely and wholly contrary to the position it had taken and steadfastly maintained since the inception of the arbitration. From May 30, 1995 through September 23, 1997, HMI stoically maintained its position that it is the arbitrator who should decide the threshold issues of arbitrability and timeliness. Despite having maintained this position for more than two years, HMI completely abandoned this position on or about September 23, 1997, when HMI commenced a proceeding in State Supreme Court, New York County, to obtain a permanent stay of the arbitration proceedings pursuant to CPLR 7503(c). Simply, HMI now sought to have the court determine that which HMI demanded be determined by the arbitrator.

On October 23, 1997, Worth Capital removed the action to the United States District Court for the Southern District of New York, on the ground that a federal question was presented under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, ("FAA"), and that the district court had diversity jurisdiction over the parties pursuant to 28 U.S.C. § 1332. (App. 9a-10a).

After the stay petition was filed on September 23, 1997 by HMI, and continuing after the removal was effectuated on October 23, 1997, HMI continued to

participate in the arbitration proceeding. On October 6, 1997, HMI complained to AAA that it had not received documents responsive to its request for production, and on November 17, 1997, a telephone conference was held with the AAA in which HMI's counsel participated, and the parties agreed on a hearing date in February of 1998 and upon a document demand date.

ARGUMENT

HMI WAIVED ITS RIGHT TO SEEK A PERMANENT JUDICIAL STAY OF ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AS A RESULT OF ITS AGREEMENT TO SUBMIT THE ISSUE OF ARBITRABILITY TO THE ARBITRATOR AND AS A RESULT OF ITS ACTIVE PARTICIPATION IN THE ARBITRATION PROCESS FOR SOME TWO YEARS

In the Second Circuit's Order affirming the district court's order granting HMI's Motion for Summary Judgment permanently staying arbitration and denying Worth Capital's motion for summary judgment to compel arbitration, the Second Circuit essentially held that a party to a broad based arbitration agreement can seek an eleventh hour permanent judicial stay of arbitration from a federal district court, notwithstanding the fact that the party agreed to submit the issue of arbitrability to the arbitrator and participated in the arbitration process for some two years. The Second Circuit affirmed the granting of HMI's Motion for Summary Judgment permanently staying the arbitration despite the fact that over a two year period HMI not only agreed upon an

arbitrator, requested that the venue of the arbitration be moved from one state to another, participated in the selection of dates for hearings to take place, participated in hearings, and requested discovery materials, but additionally agreed to submit all issues of fact and of law, including the issues of arbitrability and timeliness, to the arbitrator to decide. Under these circumstances, the Second Circuit's ruling affirming the districtcourt's granting of HMI's eleventh hour request is not only contrary to this Court's longstanding precedents favoring arbitration, but it flies in the face of equity.

It is axiomatic that the Federal Arbitration Act, leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. *McMahan Securities Co. L.P. v. Forum Capital Markets L.P., 35* F.3d 82, 85-86 (2d Cir. 1994). Furthermore, close questions as to whether a waiver of arbitration has occurred, (or analogously whether one has waived their right to stay arbitration), are to be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985).

The FAA's primary substantive provision states that

> "[a] written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable; save upon such grounds as exist in law or in equity for the revocation of any contract."

9 U.S.C. § 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, "and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). As this Court has repeatedly held, these provisions evidence a "liberal federal policy favoring arbitration agreements." *Moses*, 460 U.S. at 24.

It is well settled that a party who has not agreed to arbitrate "will normally have a right to a court's decision about the merits of its dispute." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). "But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value." *Id.* Here, Petitioner submits that under all the circumstances, HMI had a duty under the FAA to seek an immediate judicial stay from arbitration as soon as it determined that the matter was not arbitrable. It is absolutely ludicrous to believe that the drafters of the FAA intended to allow a party such as HMI after actively participating in the arbitration process for some two years and after not only agreeing but, in fact, demanding , *inter alia*, the issue of arbitrability be submitted to the arbitrator, to successfully seek a permanent judicial stay of arbitration at the eleventh hour. Under the Second Circuit's holding, a party can actively participate in an arbitration, select an arbitrator, submit legal issues such as venue and arbitrability to an arbitrator, and engage in discovery for an indefinite period of time, and then years later, when it appears after having two years to examine the case that the arbitrator may rule against him, to file a petition with a court of law seeking a permanent stay of arbitration. At a minimum, the

Second Circuit's holding will encourage forum shopping. At its worst, a party who enters into an agreement to arbitrate will always have to fear that even after participating in an arbitration for years, after having expended significant amounts of time and money, and moreover, even after his opposition agrees to submit the issue of arbitrability to the arbitrator, that he will end up getting the rug pulled out from under him because his opposition decides at the eleventh hour to seek a permanent judicial stay of arbitration. Simply, the Second Circuit's ruling leaves the door through which a party may exit an arbitration wide open for an indefinite period of time, regardless of the exiting party's actions.

It is undisputed that at no time has HMI ever argued before the AAA or the arbitrator that the arbitrator lacks authority or jurisdiction to determine any threshold issue of arbitrability. To the contrary, the record before the district court demonstrates that HMI voluntarily and affirmativelyagreed, and, in fact, insisted, that the issue of arbitrability be determined by the arbitrator. The Second Circuit's decision ignores these facts, maintaining that because HMI stated in its submissions to AAA that it "'retains its right to seek to dismiss the demand on [the] ... ground[] ... that claimant is not a proper plaintiff because it is not a permitted assignee of the. contract (and therefore can neither claim under the contract nor invoke its arbitration provisions,"' that HMI "did not waive its right to challenge arbitrability" in a judicial forum. (App. 4a). Neither the FAA nor any case provides for the ability to indefinitely retain the right to later seek a permanent stay of arbitration by including any such language, where the parties actively participate in the arbitration process for some two years and moreover, agreed to submit the issue of arbitrability to the arbitrator.

The Second Circuit's decision runs afoul of this Court's decision in *First Options*. In *First Options*, this Court held that the respondents did not clearly agree to submit the question of arbitrability to the arbitrator and therefore the issue of arbitrability was subject to independent review by the courts. 514 U.S. at 947. In so holding, this Court noted that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 *quoting AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, 649 (1986). Unlike the *First Options* case, here HMI not only agreed to submit the issue of arbitrability to the arbitrator but demanded that the arbitrator decide this issue. In light of the fact that this Court's decision in *First Options* appears to sound the death knell for HMI's permanent judicial stay, HMI seeks to have the courts create a caveat to the mandate of the *First Options* case, to wit: even where a party clearly and unmistakably agrees to submit arbitrability to the arbitrator, if that party places language anywhere in the arbitration record indicating that it retains its right to seek to dismiss the demand on the grounds that the claimant is not a proper plaintiff and therefore can neither claim under the contract nor invoke its arbitration provisions, then the agreement to submit arbitrability to the arbitrator is not an agreement at all. The repercussions of allowing a party to clearly and unmistakably agree to arbitrate arbitrability and to actively participate in the arbitration process for some two years, to then, at the eleventh hour successfully seek a permanent judicial stay of arbitration would turn the entire arbitration process under the FAA on its head. *See ConnTech Development Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 685 (2nd Cir. 1996) ("[A]n objection to the arbitrability of a claim must be made on a timely basis, or it is waived"); *Fortune, Alsweet & Eldridge, Inc. v. Daniel,*

724 F.2d 1355, 1357 (9th Cir. 1983) (unjust to permit party to challenge arbitration, after voluntary participation for several months, shortly before arbitrator's decision); *Owen-Williams v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 907 F. Supp. 134, 137 (D.Md. 1995) (plaintiff's willing submission of claims to arbitration without protest during 19 days of arbitration proceedings waived any right to contest arbitration of claims), *aff'd*, No.96-1442, 1996 WL 688219 (4th Cir. Dec. 2, 1996); *see also Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2nd Cir. 1991); *Humble Oil & Refining Co. v. Local Union 866*, 271 F. Supp. 281, 284-85 (S.D.N.Y. 1967) (parties' agreement to leave issue of arbitrability to arbitrator acts as waiver of party's right to challenge arbitrators' jurisdiction); *Halley Optical Corp. v. Jagar Int'l Mktg. Corp.*, 752 F. Supp. 638, 639 (S.D.N.Y. 1990) (party who failed to seek a stay but argued lack of authority to the arbitrators waived right to object to arbitrators' jurisdiction, citing *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 704 (2d Cir. 1985) (plaintiff who failed to raise absence of an agreement to arbitrate in motion to stay arbitration waived that objection), *cert. denied*, 475 U.S. 1067(1986) *and reh'g denied* 475 U.S. 1151 (1986); *International Longshoremen's Ass'n, AFL-CIO v. West Gulf Maritime Ass'n*, 594 F. Supp. 670, 674 (S.D.N.Y. 1984) ("One who voluntarily participates in arbitration will not thereafter be heard to complain that the arbitrator was withoutauthority to act."); *Torrington Co. v. Metal Prods. Workers Union Local 1645, UAW-AFL-CIO*, 347 F.2d 93, 95 (2d Cir. 1965), *cert. denied*, 382 U.S. 940 (1965); *Teamsters Local Union 533 v. Herbert Fuel Oil & Trucking Co.*, 543 F. Supp. 831, 834 (E.D.N.Y. 1982) (submission when parties expressly agreed that arbitrability was for arbitrator to decide); *New York Hotel & Motel Trades Council, AFL-CIO v. Hotel Nikko of New York, Inc.*, 1991 WL 168284

(S.D.N.Y. Aug. 22, 1991) ("The right, however, to seek *de novo* review is waived if the parties agreed to submit the threshold jurisdiction question to the arbitrator.").

In light of HMI's position that there was no agreement to arbitrate between Worth Capital and HMI, HMI had two clear choices upon receipt of Worth Capital's demand for arbitration: 1) promptly seek a permanent judicial stay of the arbitration proceedings, or 2) agree to submit the issues to arbitration. HMI sought the latter. While the FAA is silent as to any time limitations within which a party must seek a judicial stay of arbitration, it is certainly clear from all of the authorities cited herein that the drafters of the FAA did not envision allowing a party to do what HMI has done here; agree to submit the issue of arbitrability to the arbitrator, participate in the arbitration process for some two years, and then successfully seek a permanent judicial stay of the arbitration at the eleventh hour. To allow such a holding to stand would be devastating to the arbitration process as a whole. Parties agree to arbitrate to avoid the judicial process. Under the Second Circuit's ruling, the judicial process parties sought to escape would always be lurking right around the corner; no matter how far into the arbitration process the parties were, no matter what the parties agreed to.

CONCLUSION

WHEREFORE, based upon the foregoing authority, Petitioner respectfully requests that the Honorable Court accept jurisdiction over this matter, grant this Petition for Writ of Certiorari, address the question presented herein, and reverse the judgment of the Second Circuit Court of Appeals affirming the district court's permanent stay of arbitration and order that this matter be compelled to arbitration.

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(Any footnotes trail end of each document)

No. 98-7732

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMAN MILLER, INC.,
Petitioner-Appellee,

- v. -

WORTH CAPITAL, INC.,
Respondent-Appellant.

March 10, 1999, Decided

COUNSEL: Appearing for Appellant: Michael A. Pancier, Scott W. Rothstein, Ft. Lauderdale, Fla.

Appearing for Appellee: Philip M. Chiappone, McCanliss & Early, N.Y., N.Y.

JUDGES: Present: HONORABLE AMALYA L. KEARSE, HONORABLE ROBERT D. SACK, Circuit Judges, HONORABLE SIDNEY H. STEIN, District Judge *.

OPINION: SUMMARY ORDER

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

Respondent Worth Capital, Inc. ("Worth") appeals from a judgment of the United States District Court for the Southern District of New York, Shira A. Scheindlin, Judge, granting the request of petitioner Herman Miller, Inc. ("Herman Miller"), for a permanent stay of arbitration, and from an order denying reconsideration of that decision. On appeal, Worth argues, relying principally on New York law, that Herman Miller waived its right to contest arbitrability because it participated in arbitration proceedings; it also argues that the question of arbitrability should have been left to the arbitrator to decide, and that if that issue was properly one for the court, the court should have concluded that its claim was arbitrable. For the reasons that follow, we affirm.

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., arbitration "'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986)). A party may be found to have waived its objection to arbitrability, however, if it has participated extensively in arbitration proceedings without asserting its objection in timely fashion. See, e.g., ConnTech Development Co. v. University of Connecticut Education Properties, Inc., 102 F.3d 677, 685 (2d Cir. 1996); Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir.), cert. denied, 502 U.S. 910, 116 L. Ed. 2d 248, 112 S. Ct. 305 (1991). The question of whether there has been a waiver of the right to stay arbitration is governed by federal

law, see, e.g., Woodcrest Nursing Home v. Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, 788 F.2d 894, 899 (2d Cir. 1986) (per curiam), and a waiver of the right to challenge arbitrability is less readily inferred under federal law than under New York state law, see id. Where one side contends that a party's participation in arbitration implicitly constituted an agreement to have the arbitrator resolve questions of arbitrability, the courts should not infer that the parties so agreed "unless there is 'clear and unmistakable' evidence that they did so." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995) (emphasis added) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. at 649).

In the present case, Worth contends that it acquired the right to compel arbitration by virtue of an assignment from a party with which Herman Miller had agreed to arbitration; and it argues, citing state-law authorities, that Herman Miller, by participating in the early stages of the arbitration proceedings, waived its right to avoid arbitration. The district court properly ruled that federal law governs, and it found that under the federal standard, Herman Miller's conduct did not amount to a waiver of its right to challenge arbitrability. This finding is amply supported by the record. Although Herman Miller did not file the present suit petitioning for a stay of arbitration until some two years after the proceeding was commenced, little of a substantive nature occurred in the interim. Rather, it appears that during that time Herman Miller requested that Worth provide a copy of the document that Worth contended was the relevant assignment, and that Worth failed to comply and failed to respond to inquiries from both Herman Miller and the American Arbitration Association ("AAA"). Indeed, it appears that Worth did not

produce the assignment on which it based its claim of arbitrability until after Herman Miller commenced the present suit. Further, the record shows that from the outset, Herman Miller repeatedly reserved the right to contest the existence of an agreement to arbitrate. For example, Herman Miller's motion for a change of venue, made some three weeks after the arbitration proceeding was commenced, was accompanied by the statement that "Herman Miller retains its right to seek to dismiss the demand on [the] . . . ground[] . . . that claimant is not a proper plaintiff because it is not a permitted assignee of the contract (and therefore can neither claim under the contract nor invoke its arbitration provisions)." (Herman Miller letter to AAA dated May 30, 1995, at 6; see also Herman Miller letter to AAA dated May 7, 1996, at 2 (requesting a preliminary hearing in part "to raise with the arbitrator the fundamental legal issue as to whether claimant has any right at all, given that the contract on which the claim (and arbitration) is based is expressly non-assignable").) The district court properly found that Herman Miller did not waive its right to challenge arbitrability.

Nor do we find merit in Worth's contention that the district court should have referred to the arbitrator the question of whether there was a valid assignment to Worth that gave it the right to compel Herman Miller to arbitrate. The question of "whether a person is a party to [an] arbitration agreement" is a threshold question to be determined by the court, and not by an arbitrator. Interbras Cayman Co. v. Orient Victory Shipping Co., 663 F.2d 4, 7 (2d Cir. 1981) (per curiam). Thus, where a party's right to invoke an arbitration clause depends on a contested assignment of contract, the issue of the validity of the alleged assignment is for the court, rather than the arbitrator, to decide. See American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821,

828-29 (2d Cir. 1968) (reversing district court's decision to leave question of assignment's validity for the arbitrator); id. at 829 ("before ordering ASE to arbitration, the district court should have first determined whether there was an agreement to arbitrate between ASE and [the purported assignee]").

In the present case, Worth sought arbitration pursuant to a contract between Herman Miller and R&G Affiliates ("R&G"). The agreement contained a clause forbidding R&G to assign the agreement to a third person without the consent of Herman Miller. The question of whether the contract had been properly assigned to Worth was a question for the district court, not the arbitrator, to decide. There being no evidence that Herman Miller consented to any assignment of the contract to Worth, we see no error in the district court's finding that there was no agreement to arbitrate between Herman Miller and Worth, and we affirm that finding substantially for the reasons stated in Judge Scheindlin's Opinion and Order dated April 20, 1998. There being no such agreement, the district court properly enjoined the arbitration proceeding commenced by Worth.

We have considered all of Worth's contentions on this appeal and have found them to be without merit. The order and judgment of the district court are affirmed.

Footnote

* Honorable Sidney H. Stein, of the United States District Court for the Southern District of New York, sitting by designation.

97 Civ. 7878 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of HERMAN MILLER, INC., Petitioner, For Judgment Staying the Arbitration Commenced By, WORTH CAPITAL, INC., Respondent.

April 20, 1998, Decided
April 21, 1998, Filed

COUNSEL: For Herman Miller Inc., Petitioner: Philip M. Chiappone, Esq., McCanliss & Early, New York, New York.

For Worth Capital, Inc., Respondent: Robin S. Garson, Esq., Brooklyn, New York.

For Worth Capital, Inc., Respondent: Thomas Torto, Esq., New York, New York.

JUDGES: SHIRA A. SCHEINDLIN, U.S.D.J.

OPINIONBY: SHIRA A. SCHEINDLIN

OPINION: OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

On December 26, 1997, Petitioner Herman Miller, Inc. ("Miller") moved for summary judgment permanently staying the arbitration commenced by Respondent Worth Capital,

Inc. ("Worth") pursuant to Rule 56 of the Federal Rules of Civil Procedure. On the same day, Worth submitted a cross motion for summary judgment compelling arbitration and dismissing the petition to stay arbitration. For the following reasons Worth's motion is denied and Miller's motion is granted.

I. Background

The present controversy stems from a License Agreement ("the Agreement") dated October 1, 1988, between Miller and R&G affiliates ("R&G"), whereby R&G obtained a license to independently operate a Miller Office Pavilion. See Miller's Notice of Motion ("Mil. Not.") Ex. 1. In order for R&G to obtain the license, Miller required that James J. Gangitano, President of R&G, personally guarantee R&G's debt to Miller under a revolving credit agreement and pledge his R&G stock to Miller. On page 14 of the Agreement, Gangitano acknowledged the Agreement and that he was "the beneficial owner of major equity interests" in R&G. Id. The Agreement contained the following arbitration provision:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be resolved exclusively by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be conducted at a location selected by the arbitrator(s). The arbitration award shall be final and binding on the parties and enforceable in any court of competent jurisdiction.

In addition, the agreement also stipulated:

> [Miller] has entered into this Agreement based upon its evaluation of Licensee's [R&G's] form and method of conducting business and the business acumen, financial capacity, and reputation of Licensee and its principals. This agreement is personal to Licensee and may not be transferred, in whole or in part, voluntarily, involuntarily, or by operation of law, including by any merger or consolidation, substantial change in the ownership or control of Licensee's business, or by any other means, except in accordance with this Article VII.

This provision also prescribes a specific transfer procedure, which requires, inter alia, notice of the proposed transfer and approval by Miller.

In May of 1989, Miller took over the operations of R&G. See Affidavit of James J. Gangitano in Opposition to Herman Miller, Inc.'s Motion for Summary Judgment and in Support of Worth Capital's Cross Motion for Summary Judgment ("Gangitano Aff.") at p. 2. Sometime prior to January 3, 1990, Gangitano orally transferred all of R&G's claims against Miller to himself. Id. at 3. On January 3, 1990, Gangitano assigned to Worth "all right, title, interest and claim that [he] ... may personally have in or against Herman Miller, Inc." Mil. Not. Ex. 15.

II. Legal Standard

A. Summary Judgment

A motion for summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party has the burden of identifying evidence that demonstrates the absence of a genuine material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). A court must resolve all ambiguities and draw all reasonable inferences against the moving party. Because both parties have filed summary judgment motions stipulating that there are no genuine issues of material fact and the court finds none, these motions will be decided as a matter of law.

B. Jurisdiction

Worth removed this action from New York Supreme Court pursuant to 28 U.S.C. § 1441 (removal jurisdiction), 9 U.S.C. § 1 et seq. (the Federal Arbitration Act), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332 (diversity jurisdiction).

Section 4 of the Federal Arbitration Act allows a party to petition a federal district court to direct arbitration provided that the court would have jurisdiction under Title 28 absent the arbitration agreement. 9 U.S.C. § 4. Before such an order can issue, therefore, the Court must have an independent basis for jurisdiction. Worth alleges diversity jurisdiction under 28 U.S.C. 1332, which states that district courts have original jurisdiction in civil actions where the matter in

controversy exceeds the sum or value of $ 75,000 and is between, inter alia, citizens of different states. Section 1332 states that a corporation is a citizen of "any State by which it has been incorporated and of the State where it has its principal place of business..." Miller does not contest that the amount in controversy is more than $ 75,000 and admits that Miller is a Michigan corporation with its principal place of business in Michigan. See Memorandum of Law at 3. Worth is a Florida Corporation with its principal place of business in Pompano Beach, Florida. See Affidavit of Corporate Citizenship. Therefore, the court has jurisdiction over this matter.

In May of 1995, Worth made a Demand for Arbitration to the American Arbitration Association ("AAA"), which acknowledged receipt of this demand on May 10. Mil. Not. Ex. 1. By letter dated May 30, 1995, Miller requested that the venue for the arbitration hearing be moved from Miami, Florida to New York, New York. Mil. Not. Ex. 2. The AAA granted Miller's request on December 19, 1995. Mil. Not. Ex. 6. After the parties submitted lists of proposed arbitrators, the AAA appointed Ruth Kurtz, Esq. as the arbitrator and scheduled hearings for April 23-26, 1996. Mil. Not. Ex. 7.

After Worth's request for a delay of the April hearings was granted, the AAA, at Miller's request, held a preliminary hearing where the parties agreed that the arbitration would be held on December 15-19, 1997. Mil. Not. Ex. 12. On September 23, 1997, Miller sought a stay of the arbitration pursuant to § 7503(c) of the New York Civil Practice Law and Rules ("CPLR"). See Petition To Stay Arbitration at 4. On October 23, 1997, Worth removed Miller's Petition to this Court "upon the ground that a federal question was presented under the Federal Arbitration Act. 9 U.S.C. §§ 1, et seq."

Memorandum of Law in Support of Respondent Worth Capital's Cross-Motion for Summary Judgment Compelling Arbitration and Dismissing Petition to Stay Arbitration ("Worth Mem.") at 10.

III. Discussion

A. Timeliness

Miller contends that its application to permanently stay arbitration is timely because the Federal Arbitration Act ("FAA") contains no time limitation. See Memorandum of Law in Support of Petitioner Herman Miller, Inc.'s Motion for Summary Judgment Permanently Staying the Arbitration Commenced by Worth Capital, Inc. ("Miller Mem.") at 8. However, Worth correctly counters that because the FAA is silent as to any time limitation, federal courts must borrow the appropriate state limitation periods. See, e.g., Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 171, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983) ("resort to state law remains the norm for borrowing limitation periods"); Favara, Skahan, Tabaczyk, Ltd. v. Ewing, 1992 U.S. Dist. LEXIS 4570, 91 Civ. 7878, 1992 WL 80659 (S.D.N.Y. April 9, 1992)("because the FAA does not address the mechanics of staying an arbitration ... New York courts borrow CPLR § 7503(c) for limitation period purposes"). Thus, a party must move to stay an arbitration within twenty (20) days of receipt of the demand for arbitration, providing that the party has received notice of this time limitation by the demanding party. See CPLR § 7503(c)(McKinney 1997).

Because Worth did not give notice of the twenty day limit in its demand, it cannot now invoke the twenty day limitation. Worth argues, however, that if § 7503(c) is inapplicable, a

federal court must still apply CPLR § 7503(b), which only allows parties that have not participated in the arbitration to apply for a stay.[1] Id. Worth's argument is unavailing. Section 7503(b) is a waiver provision not a limitations period.

Federal courts have found that certain forms of participation waive rights or otherwise prevent parties from contesting the jurisdiction of an arbitrator to hear a dispute. See, e.g., Gvozdenovic v. United Airlines, Inc., 933 F.2d 1100 (2d Cir. 1991)(holding that appellants were bound by arbitrator's ruling because they voluntarily and without objection participated in arbitration by, inter alia, arguing their case before an arbitrator); Teamsters Local Union No. 764 v. J.H. Merrit and Company, (3d Cir. 1985) (appellant waived its right to contest the arbitrators' jurisdiction after arbitration by failing to raise its jurisdictional objection during arbitration); Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d 580, 584 (5th Cir. 1980) (denying appellants claim that arbitrator exceeded the scope of his authority in deciding an issue because neither party contested the arbitrability of the dispute and the entire dispute was presented to the arbitrator without reservation. "On whatever basis it rests, waiver, estoppel or new contract, the result is that the grievance submitted to the arbiter defines his authority without regard to whether the parties had a prior legal obligation to submit the dispute."). However, no federal court has found a waiver when the arbitration has not yet occurred. See, e.g., Woodcrest Nursing Home v. Hotel. Hospital. Nursing Home and Allied Services Union, Local 144, 788 F.2d 894, 899 (2d Cir. 1986) (minimal participation, "amounting for the most part to efforts to postpone or delay arbitration," does not mean that the nursing home waived its right to seek a stay). Though Miller's participation may have

been slightly greater than the nursing home's in Woodcrest, Worth cites no case, nor has the Court found any, that permits a federal court to find waiver of the right to seek a stay under the Federal Arbitration Act because a party participated in choosing an arbitrator and selecting arbitration dates. Thus, Miller's petition is timely.

B. Can Worth invoke the arbitration provision?

Worth argues that as an assignee of the Agreement it has a right to compel Miller to arbitrate. See, e.g., Worth Mem. at 22. It cites Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960) ("assignees of contracts containing arbitration provisions may become parties to such provisions") in support of this proposition. However, that court also noted that "ordinary contract principles determine who is bound by such provisions." Id. See also, AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) ("'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit'"). Thus for Worth to invoke the arbitration provision under the Agreement, R&G's assignment to Worth must have been valid. This Agreement specifically prohibited transfers by R&G except under certain conditions, including notice to Miller. These conditions were not met. Because Worth cannot be considered an assignee of the Agreement, it cannot invoke its arbitration provision.

Worth next argues that the question of whether its claim is arbitrable should be determined by an arbitrator. Worth cites Paine Webber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996), in support of this argument. Once again, Worth's reliance is misplaced. In Bybyk, both parties were signatories to the

agreement. Where the party seeking arbitration is not a party to the arbitration agreement, the question of arbitrability is for the court, not the arbitrator.

C. Judicial Estoppel

Worth's final argument is "the court should judicially estop [Miller] from changing its long held prior position... [that it is] the arbitrator who should decide threshold issues of arbitrability." Worth Mem. at 18. The elements of judicial estoppel in this circuit are: "first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner." Bates v. Long Island Railroad Co., 997 F.2d 1028, 1038 (2d Cir. 1993). Without discussing whether Miller implicitly "argued" that the arbitrator should decide the issue of arbitrability in the preliminary hearing to set arbitration dates, it is clear, at least, that this position has not been adopted by a court. Thus, Miller is not judicially estopped from moving to stay the arbitration.

IV. Conclusion

Miller's motion for summary judgment permanently staying the arbitration commenced by Worth is timely. Because Worth was not an assignee of the Agreement, its motion to compel arbitration is denied. Miller's motion for summary judgment permanently staying the arbitration commenced by Worth is granted. A conference is scheduled for May 13 at 4:30 p.m. So Ordered.

Shira A. Sheindlin

Dated: New York, New York

April 20, 1998

Footnotes

[1] Worth cites Murphy v. Wack, 1990 U.S. Dist. LEXIS 6365, 89 Civ. 3300, 1990 WL 77249, (S.D.N.Y. May 29, 1990), in support of this proposition. In that case the court denied a motion to stay arbitration because under New York law "participation in arbitration ... acts as a waiver of [a party's] right to seek a stay." However, Murphy did not arise under the FAA. In addition, it provides no support for a federal court to borrow CPLR § 7503(b).

97 Civ. 7878 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of HERMAN MILLER, INC., Petitioner, For Judgment Staying the Arbitration Commenced By, WORTH CAPITAL, INC., Respondent.

1998 U.S. Dist. LEXIS 6275

May 4, 1998, Decided

May 4, 1998, Filed

DISPOSITION: Worth's motion for reconsideration denied.

COUNSEL: For Petitioner: Philip M. Chiappone, Esq., McCanliss & Early, New York, New York.

For Respondent: Robin S. Garson, Esq., Brooklyn, New York.

JUDGES: SHIRA A. SCHEINDLIN, U.S.D.J.

OPINIONBY: SHIRA A. SCHEINDLIN

OPINION: MEMORANDUM ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

In an Opinion and Order dated April 20, 1998 ("Opinion"), I granted petitioner Herman Miller Inc.'s motion for summary judgment permanently staying the arbitration commenced by respondent Worth Capital, Inc. ("Worth") and denied Worth's cross-motion to compel arbitration. See Herman Miller, Inc. v. Worth Capital Inc., 1998 U.S. Dist. LEXIS 5557, 97-7878, (S.D.N.Y. filed April 20, 1998). Worth now moves pursuant to Local Civil Rule 6.3 for reconsideration of the denial of its motion.

Pursuant to Local Rule 6.3, a party seeking reconsideration must demonstrate that the Court overlooked controlling decisions or factual matters "that might materially have influenced its earlier decision." Anglo American Ins. Co. v. Calfed, Inc., 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (quoting Morser v. AT & T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y. 1989)); see also Frankel v. ICD Holdings S.A., 939 F. Supp. 1124, 1126 (S.D.N.Y. 1996).

Worth fails to meet this standard. It asserts that the court overlooked the "fact" that the assignment of contractual rights from R&G Affiliates to Worth was valid. This is not a fact, nor did the court overlook it; it is a legal argument with which the court disagreed. See Opinion at 10. Worth also

contends that the court erred in its holding that Murphy v. Wack, 1990 U.S. Dist. LEXIS 6365, 89 Civ. 3300, 1990 WL 77249 (S.D.N.Y. 1990) is distinguishable from the one at bar. Even if Worth is correct, however, the decision of a fellow district court is not a "controlling" one for the purposes of Local Rule 6.3. Worth's motion for reconsideration is therefore denied.

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

May 4, 1998

US Code as of: 01/26/98

Sec. 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Supreme Court, U.S.
FILED
JUL 12 1999
OFFICE OF THE CLERK

(2)

No. 98-1992

IN THE
Supreme Court of the United States

WORTH CAPITAL, INC.,
a Florida Corporation,

Petitioner,

v.

HERMAN MILLER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit Court of Appeals, on the facts before it, properly ruled that the respondent had not waived its right to judicial review of the issue of whether there existed an enforceable agreement to arbitrate between petitioner and respondent notwithstanding the respondent's engaging in pre-hearing, administrative activity limited to a change of venue, the selection of an arbitrator and the setting of hearing dates, while contemporaneously contesting the existence of an arbitration agreement?

STATEMENT PURSUANT TO RULE 29.6

The respondent Herman Miller, Inc. has no parent corporation and there is no publicly held company that owns more than 10% of the respondent's stock.

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STATEMENT OF THE CASE

This petition seeks review by this Court of the Second Circuit's summary order affirming the judgment of the District Court, Southern District of New York, which permanently stayed an arbitration commenced by the petitioner Worth Capital, Inc. ("Worth Capital") against respondent Herman Miller, Inc. ("Herman Miller") filed with the American Arbitration Association ("the Association"). App. 1a-15a.*

The District Court granted Herman Miller's motion for summary judgment permanently staying the arbitration on the grounds that Herman Miller and Worth Capital had no agreement to arbitrate and that Herman Miller did not waive its right to contest before the District Court the existence of an enforceable, written agreement to arbitrate by engaging in pre-hearing activity limited to seeking a change in venue, selecting an arbitrator and setting dates for arbitration. App. 12a-13a.

The Second Circuit affirmed the judgment of the District Court stating that the court, not the arbitrator, had the obligation to determine the threshold question of

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* The "opinion" of the Second Circuit to which the petitioner refers in its petition was actually a summary order of the Circuit Court to which was appended a written statement. Pursuant to the rule of the Second Circuit, Local Rule § 0.23, the written statement appended to the summary order does not constitute a formal opinion of the court and it shall not be cited or otherwise used in unrelated cases before the Second Circuit or any other court. A statement to this effect was endorsed on the Circuit Court's summary order, filed on March 10, 1999, but does not appear in the reproduction of the Circuit Court's order in the petitioner's appendix.

whether there was a valid, enforceable agreement to arbitrate between the parties. App. 4a-5a. The Circuit Court found no merit in the petitioner's argument that respondent's pre-hearing activity amounted to a waiver of its right to seek a judicial determination of the efficacy of the assignments upon which the petitioner was basing its right to compel arbitration. App. 3a-4a.

The background of this case is as follows. In early 1989, R & G Affiliates, Inc. ("R & G Affiliates") was a licensee of Herman Miller under an Office Pavilion License Agreement, dated October 1, 1988 ("the License Agreement"). App. 7a. R & G Affiliates was also indebted to Herman Miller under a revolving credit agreement secured by the assets of R & G Affiliates. App. 7a. James J. Gangitano ("Gangitano") was a principal of R & G Affiliates who had guaranteed the debt but was not a signatory to the License Agreement. App. 7a-8a. In May of 1989, when R & G Affiliates defaulted under its credit arrangement with Herman Miller, Herman Miller foreclosed on R & G Affiliates' assets. App. 8a.

On January 3, 1990, Gangitano purportedly assigned to petitioner Worth Capital claims which he alleged to have against Herman Miller. App. 8a. On some unspecified date prior to that, Gangitano alleges to have orally transferred all of R & G Affiliates' claims (but not the License Agreement) against Herman Miller to himself. App. 8a. It was pursuant to that January 3, 1990 assignment from Gangitano to Worth Capital that petitioner was purportedly proceeding in the arbitration which it filed with the Association. App. 13a.

Petitioner's statement of the case distorts the record in two ways:

> (1) by asserting, when the District Court found otherwise, that it was in fact an assignee of R & G Affiliates with the right to compel arbitration with Herman Miller concerning claims which R & G Affiliates or its principal Gangitano may have had against Herman Miller (Pet 5-7); and
>
> (2) by insisting in contradiction to the record before the Circuit Court (App. 3a) that Herman Miller actively and unconditionally participated in the arbitration proceedings prior to moving for a stay of arbitration. Pet. 7-11.

The District Court disposed of the first point. In her decision, the District Judge held that the arbitration provision contained in the License Agreement between Herman Miller and R & G Affiliates did not devolve to the petitioner Worth Capital by reason of any alleged assignment from R & G Affiliates to Gangitano or from Gangitano to Worth Capital. App. 13a. Applying state law contract principles, the District Court ruled that since neither Gangitano nor Worth Capital obtained the required consent of Herman Miller to the assignment of the License Agreement, which included the provision for arbitration, the alleged assignments were ineffective to transfer the right to arbitration to Worth Capital. App. 13a. The Second Circuit did not disturb the finding of the District Court (App. 5a); and the petitioner does not argue in its petition that the finding of the District Court was erroneous. Despite its continued insistence to the contrary (Pet. 5-7) in contradiction to the District Court's finding (App. 13a), the petitioner has no enforceable, written agreement with Herman Miller to arbitrate its purported claims.

Petitioner also creates an exaggerated portrayal of pre-hearing activity to support its argument that Herman Miller actively and unconditionally participated in the arbitration proceedings prior to moving for a stay of arbitration. Pet. 7-10. That portrayal was rejected by the Circuit Court. App. 3a-4a.

Herman Miller did not at any time argue or submit to the arbitrator the issue of whether there was an enforceable agreement to arbitrate between Herman Miller and Worth Capital. App. 12a-13a. All of the activity described by the petitioner in its brief was administrative in nature and directed, almost exclusively, to the tribunal administrator; and, at every stage prior to the filing of its motion for a stay of arbitration, the respondent's attorneys challenged the jurisdiction of the Association. App. 4a.

Not surprisingly, the petitioner ignores the conclusion drawn by the Circuit Court that in the two years prior to the filing of respondent's motion for a stay of arbitration, "little of substantive nature occurred in the interim." App. 3a. The record amply supports the Circuit Court's conclusion.

Subsequent to the petitioner's filing of its demand for arbitration with the Association on May 5, 1995, the following occurred:

- The issue of the proper venue for the demanded arbitration was resolved by the Association (not by an arbitrator) (Pet. 8);

- An arbitrator was selected (but no substantive issues — including the issue of arbitrability — were submitted for decision) (Pet. 8);

- Hearings were scheduled to commence on April 23, 1996, but were cancelled at the request of the petitioner's counsel and not re-scheduled until over two years later (Pet. 8);

- A preliminary conference was held on August 12, 1997, at which time the petitioner was required to serve an amended statement of claim and dates for arbitration were set for December, 1997 (Pet. 8);

- On or about September 3, 1997, the petitioner served an amended statement of claim (Pet. 10);

- On September 23, 1997, the respondent filed its motion to stay arbitration. Pet. 2.

There were no hearings held on the issue of arbitrability or the merits of the dispute prior to the respondent's action to stay arbitration — either before the Association or the arbitrator. The discovery disputes and the setting of arbitration dates for February of 1998, to which the petitioner refers (Pet. 10-11), all occurred after respondent filed its motion and were necessitated because petitioner's counsel would not consent to a stay of arbitration pending determination of respondent's motion.

Thus, contrary to the picture of feverish activity painted by the petitioner, the record reveals that substantive arbitration on any issue had not in fact commenced by the time that respondent filed its motion to stay arbitration. Indeed, by August 26, 1996, the Association, not having heard from petitioner's counsel regarding the status of the arbitration, was prepared to mark the matter as settled and withdrawn from arbitration.

The petition also ignores the Second Circuit's observation, grounded in the record, that the petitioner failed, between the commencement of the arbitration and the motion to stay arbitration, to respond to inquiries from both the respondent and the Association for production of the assignment upon which the petitioner claimed standing. In fact, the petitioner "did not produce the assignment on which it based its claim of arbitrability until after" the respondent commenced its suit to stay arbitration. App. 3a-4a.

It is on this record that the Circuit Court properly ruled that the respondent had not waived its right to contest before the District Court the existence of an enforceable, written agreement to arbitrate. Reduced to its essence, the petitioner's argument for the granting of its petition is that it is dissatisfied with the Circuit Court's application of the law to the facts of this case.

SUMMARY OF ARGUMENT

The question presented in this case has no implication beyond the facts of this case. There is no fundamental principle of federal law at stake in conflicting decisions to warrant issuance of a writ of certiorari. The Second Circuit applied well-settled principles of law to the facts in the record; the petitioner simply disagrees with the Circuit Court's decision.

REASONS FOR DENYING THE WRIT

The decision below was a correct application of settled law and petitioner does even allege a conflict among the circuit courts. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which [the Court uses its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.") The petitioner's argument in favor of granting its petition is simply that it disagrees with the Circuit Court's application of the law to the record before it and that the Circuit Court's decision is inequitable. Pet. 12. That is not a justifiable basis for granting a petition for a writ of certiorari. *See* Sup. Ct. R. 10 In any event, the Second Circuit was not in error.

" '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The Federal Arbitration Act does not alter that fundamental principle. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so (citation omitted)." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

A court, not an arbitrator, should make the threshold determination of whether there exists a written, enforceable agreement to arbitrate, unless there is clear and unmistakable evidence that the parties agreed to have the arbitrator decide

the issue. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* at 946. Of course, in this case, the respondent never argued the issue of arbitrability to the arbitrator and never agreed to forego judicial review of that issue.

Rather than running "afoul of this Court's decision in *First Options*," as argued by the petitioner (Pet. 15), the Second Circuit's statement, consistent with *First Options*, took note that the respondent had "repeatedly reserved its right to contest the existence of an agreement to arbitrate." App. 4a. For example, in their May 30, 1995 letter to the Association, the respondent's attorneys made clear from the start that " 'Herman Miller retains its right to seek to dismiss the demand on [the] . . . ground[ ] . . . that claimant (*i.e.*, Worth Capital) is not a proper plaintiff because it is not a permitted assignee under the contract (and therefore can neither claim under the contract nor invoke its arbitration provisions).' " App. 4a. If the reservation of rights by respondent's counsel were not enough to demonstrate that the respondent did not intend to be bound to arbitration on any issue, the most palpable manifestation of its intent was the filing of its motion to stay arbitration — prior to the commencement of hearings before the arbitrator.

The petitioner predicts the virtual destruction of the arbitration process as a result of the Second Circuit's order. Pet. 15. The cases which petitioner cites in support of that dire prediction, however, are perfectly consistent with the Second Circuit's statement in support of its summary order. In each of those cases, the issue of whether there was an

enforceable, written agreement had actually been tried, argued or submitted to the arbitrator for decision, a decision of the arbitrator had already been rendered before the issue of arbitrability was asserted, or there was no issue as to the existence of an enforceable written arbitration agreement: *Conntech Development Co. v. University of Connecticut Education Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996) (The issue before the court was whether certain claims fell within an agreement to arbitrate, not whether there existed an enforceable agreement; in any event the parties were substantially completed with trial on the merits before objections were raised); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100 (2d Cir. 1991) (Objectants participated in hearings on the merits and did not raise the absence of an enforceable agreement to arbitrate until after the arbitral award was rendered); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985) (Objectant made a motion to stay arbitration before the district court, but failed to raise the issue of the lack of an enforceable agreement to arbitrate), *cert. denied*, 475 U.S. 1067 (1986); *Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (9th Cir. 1983) (Respondent failed to make a motion to vacate the arbitration award within the statutory period following the rendering of the arbitrator's decision; respondent's representative attended several hearings on the merits during which the representative introduced evidence into the record); *Torrington Co. v. Metal Products Workers Union Local 1645*, 347 F.2d 93 (2d Cir.) (The issue was not whether there was an agreement to arbitrate but whether the dispute fell within the scope of the agreement), *cert. denied*, 382 U.S. 940 (1965); *Owen-Williams v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 907 F. Supp. 134 (D. Md. 1995) (Claimant submitted merits of dispute to arbitrators who rendered a decision adverse to claimant after

which claimant challenged the validity of the agreement to arbitrate), *aff'd*, 103 F.3d 119 (4th Cir. 1996); *New York Hotel and Motel Trades Council v. Hotel Nikko New York, Inc.*, Nos. 91 Civ. 0795, 91 Civ. 0755 (DNE), 1991 WL 168284 (S.D.N.Y. Aug. 22, 1991) (The objecting party filed its objections to the jurisdiction of the arbitrator only after the arbitration panel issued a decision on the merits); *Halley Optical Corp. v. Jagar International Marketing Corp.*, 752 F. Supp. 638 (S.D.N.Y. 1990) (Objecting party moved to vacate the arbitration award after a hearing on merits at which the issue of the existence of an arbitration agreement had actually been submitted to the arbitrators for decision); *International Longshoremen's Ass'n v. West Gulf Maritime Ass'n*, 594 F. Supp. 670 (S.D.N.Y. 1984) (The arbitration panel issued a decision before an objection was raised as to its jurisdiction); *Teamsters Local Union No. 533 v. Herbert Fuel Oil & Trucking Co.*, 543 F. Supp. 831 (E.D.N.Y. 1982) (The parties submitted the issue of whether there was an agreement to the arbitrator who rendered a decision); *Humble Oil & Refining Co. v. Local Union 866*, 271 F. Supp. 281 (S.D.N.Y. 1967) (The court refused to find waiver by mere participation of respondent in arbitration on merits; it did not appear that the Union and the Company agreed to leave the question of arbitrability to arbitrators).

The petitioner does not cite a single case (and the District Court was unable to find one [App. 13a]) which holds that a party waives his right to judicial review of the issue of whether there is an enforceable agreement to arbitrate because that party engaged in pre-arbitration activity limited to seeking a change of venue, selecting an arbitrator and setting dates for arbitration. What is manifest in the cases cited in the petitioner's brief is that actual submission of the dispute to an arbitrator, without protest

to the arbitrator's jurisdiction, is required before a waiver of judicial review may be found. *See Woodcrest Nursing Home v. Hotel, Hospital, Nursing Home and Allied Services Union, Local 144*, 788 F.2d 894, 899 (2d Cir. 1986); *Local 719, American Bakery and Confectionary Workers of America v. National Biscuit Co.*, 378 F.2d 918, 921-22 (3rd Cir. 1967). That is not what happened in this case. Respondent did not submit any issue to the arbitrator and it did not manifest an intent to forego judicial review of the issue of arbitrability. The Second Circuit properly applied existing law to the facts of this case.

In short, stripped of its hyperbole, Worth Capital's petition does nothing more than express dissatisfaction with the Second Circuit's view of the record. It is respectfully submitted that that is not enough to warrant a grant of a writ of certiorari to this Court.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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